United Nations CAT/C/64/D/615/2014

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 615/2014*, **

Communication submitted by:	Joyce Nakato Nakawunde (not represented by counsel)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	25 June 2014 (initial submission)
Document references:	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 30 June 2014
Date of present decision:	3 August 2018
Subject matter:	Deportation to Uganda
Procedural issues:	Lack of substantiation of claims; non-exhaustion of domestic remedies; incompatibility with the Convention
Substantive issue:	Risk to life and of torture or ill-treatment in the event of deportation to country of origin
Articles of the Convention:	1 and 3

1.1 The complainant is Joyce Nakato Nakawunde, a national of Uganda born on 13 April 1966. She submits the communication on her behalf and on behalf of her 11-year-old daughter, Sanyu, born in Canada on 14 May 2004. The complainant, who claims to be a lesbian, is subject to forcible removal from Canada to Uganda, as she overstayed her student visa.[1] She claims that her forcible removal to Uganda would constitute a violation by Canada of articles 1 and 3 of the Convention. She fears that she will be arrested, tortured and eventually killed by the Ugandan police and anti-gay mobs if returned. The complainant is not represented by counsel.

* Adopted by the Committee at its sixty-fourth session (23 July–10 August 2018).

** The following members of the Committee participated in the consideration of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

[1] The complainant did not apply for asylum in Canada. Her removal was ordered following a negative decision on her application for pre-removal risk assessment of 15 June 2014. The notification from the Canadian Border Services Agency dated 17 June 2014 informed her that her removal was scheduled to take place on 8 July 2014, at 5 a.m.

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1.2 On 30 June 2014, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new communications and interim measures, requested the State party not to expel the author while the complaint was being considered.

1.3 On 2 September 2014, the Federal Court of Canada granted the complainant leave to apply for judicial review of the second pre-removal risk assessment decision. The hearing, originally scheduled for 1 December 2014, was subsequently postponed to 20 January 2015 at the request of the complainant's counsel. A positive decision would mean that the author would be entitled to a new pre-removal risk assessment, and would be subject to a statutory stay of removal pending a decision on the assessment. If, in a new pre-removal risk assessment, the complainant were determined to be in need of protection, she would not be subject to removal and would have an opportunity to apply for permanent resident status. On 21 November 2014, therefore, the State party requested that the examination of the communication be suspended, given the pending judicial review. On 10 March 2015, the Committee decided to suspend the consideration of the complaint, until all domestic proceedings were concluded, and also to suspend the interim measures, given the information before it. On 17 April 2015, the State party advised the Committee that on 13 March 2015 the Federal Court had dismissed the complainant's application. At the same time, the State party requested that the suspension of the communication be lifted and an extension granted for it to present observations on the admissibility and merits of the communication. On 7 August 2015, the State party requested that the Committee lift its request for interim measures. On 19 August 2015, the Committee decided to lift the suspension of the case. On 19 April 2018,[2] the Committee, acting through its Rapporteur on new complaints and interim measures, denied the request of the State party to lift the interim measures.

The facts as presented by the complainant

2.1 The complainant first came to Canada on 25 December 1999 on a student visa. She applied for a Canadian work visa upon completion of her bachelor's degree, but her application was returned to her with a request for additional information. When she resubmitted her application, she was told that she had narrowly missed the deadline to apply for that immigration visa category and that she had to return to Uganda. The complainant remained in Canada illegally from October 2006 to June 2011.

2.2 The complainant always felt strongly attracted to women rather than men. While in Uganda, where homosexual activity is illegal, she buried her feelings and remained single. In 2001, at the University of Winnipeg, the complainant developed a friendship with a Kenyan woman, Ann, who was openly lesbian. In 2007, the complainant admitted to being a lesbian. Ann introduced the complainant to a Canadian woman, Lynne Martin, with whom the complainant had a relationship for about two years. The complainant became an active member of the lesbian, gay, bisexual and transgender community in Winnipeg and started to attend community events. During her relationship with Ms. Martin, the complainant decided to tell her family in Uganda about her sexual orientation. While some of her family members supported her, she was rejected by others. Her father said that she brought shame on the family and decided to disown her. An active member of the Catholic Church, he informed all the members of his congregation about the complainant's sexual orientation during a church meeting. Since the complainant's family lives in a small community, many people have come to know about her sexual orientation.

2.3 The father of the complainant's daughter allegedly called an immigration office in Winnipeg to report that the complainant was living and working in Canada illegally. Starting in March 2011, the complainant faced difficulties with the immigration authorities,

[2] On 28 October 2015, the State party's request for lifting interim measures was transmitted to the complainant for comments by 28 December 2015. The complainant sent a response to the State party's observations dated 27 December 2015, but her reply was never received by the Committee. The Committee therefore sent a reminder to the complainant on 10 April 2018. On 12 April 2018, the complainant resubmitted her comments dated 27 December 2015 on the State party's observations and informed the Committee that she was still in Canada, benefiting from the Committee's interim measures request.

and on 1 June 2011 she was issued with a removal order. The Government allowed the complainant to apply for pre-removal risk assessment against the removal order.[3]

2.4 In the context of her application for a pre-removal risk assessment of 15 June 2011, the complainant claimed that her daughter's father wanted Sanyu to undergo female genital mutilation and wanted to kill the complainant for refusing to allow her daughter to undergo that procedure. The complainant feared being arrested by the Ugandan police and eventually killed by an anti-gay mob in Uganda, and was in particular afraid of Sanyu's father, who threatened to harm her for being a lesbian and for refusing to subject her daughter to female genital mutilation. The complainant's pre-removal risk assessment application was rejected on 11 June 2012, as she was not perceived to face a risk of persecution, a risk to her life, or a risk of torture or cruel or inhuman treatment or punishment, if returned to Uganda. The complainant was also informed that the initial removal order of 1 June 2011 against her would be enforced. She received an initial notification of removal on 24 December 2012, requesting her to report to the airport on 22 January 2013.[4]

2.5 On 31 December 2012, the complainant applied to the Federal Court for a judicial review of the pre-removal risk assessment decision of 11 June 2012. By its decision dated 22 February 2013, the Court granted her leave to appeal, while it quashed the negative pre-removal risk assessment decision because the officer in charge had failed to consider all the evidence submitted by the complainant. The Court ordered the reconsideration of her pre-removal risk assessment application by a different officer. Citizenship and Immigration Canada consented to the relief sought, including a stay of her removal.

2.6 The complainant's second pre-removal risk assessment application was rejected on 19 March 2014 on the same grounds as the pre-removal risk assessment decision of 11 June 2012. On 4 May 2014, she applied to the Federal Court for leave to seek judicial review of the second negative pre-removal risk assessment decision, while requesting a stay of removal. On 14 June 2014, the complainant made a complementary submission, in reply to the observations made by Citizenship and Immigration Canada. On 13 March 2015, the Federal Court dismissed the complainant's application for leave to seek judicial review on the ground that there was insufficient evidence to establish the risk to life or risk of cruel or inhuman treatment or punishment if returned to Uganda.

The complaint

3.1 The complainant submits that Canada, by forcibly returning her to Uganda, would violate her rights under articles 1 and 3 of the Convention. She claims that her removal would put her at a serious risk of being arrested, sentenced, tortured or killed due to her sexual orientation. She submits that Uganda does not protect lesbians, and that they are criminalized, sent to jail and sentenced to death. In that regard, she refers to the Ugandan Anti-Homosexuality Act, 2014, which the complainant states is aimed at killing gays and lesbians. The complainant also fears being harassed by people who know about her sexual orientation and that she may be investigated, as there is an obligation to report anyone who is gay within 24 hours in Uganda. She describes her fears and anxiety extensively and attaches statements from friends in the lesbian, gay, bisexual and transgender community in Winnipeg, her physicians and family members both in Canada and Uganda that describe the risk of harm that the complainant would face upon return to Uganda.

3.2 She also claims to fear in particular the father of her daughter, who resents her for being lesbian and who believes that she should not be near his child, as she is "evil and dirty". She alleges that the father has threatened to kill her on several occasions,[5] and to submit her daughter to female genital mutilation. The complainant explained that she did

[3] The removal order concerns only the complainant, not her daughter who is a Canadian. In the pre-removal risk assessment it was noted that the complainant came as a student in 1999, briefly left Canada on 31 January 2004 and was then granted a student visa from 3 December 2004 to 30 October 2006.

[4] Both the removal order and the notification thereof are attached to the complaint.

[5] The complainant reports that he mentioned to family members that it would cost him 5 Canadian dollars to have her killed in Uganda.

not even go to the funeral of her mother in Uganda[6] due to the continuing threats from the father of her daughter, and because her family in Uganda told her that it would be unsafe for her to come.

3.3 The complainant claims that she has exhausted available domestic remedies in Canada. She argues that her application to the Federal Court for judicial review is not an effective remedy as it does not stop or delay the deportation in the majority of cases. She also refers to the Committee's jurisprudence in *Nirmal Singh v. Canada* (CAT/C/46/D/319/2007, para. 8.8), in which the Committee considered that the judicial review of a negative refugee protection decision or a pre-removal risk assessment decision does not provide an effective remedy.

State party's observations on admissibility and the merits

4.1 On 7 August 2015, the State party submitted observations on admissibility and the merits of the communication.

4.2 As regards the admissibility of the case, the State party submits that the communication is inadmissible on two grounds. First, the State party considers that the complainant failed to exhaust domestic remedies, as she did not apply to the Refugee Protection Division for refugee status or protection. The State party recalls that the Division is an independent, quasi-judicial, specialized tribunal that considers applications by foreign nationals seeking the protection of Canada based on fear of persecution, torture or other serious violations of human rights if they were removed to their country of origin. The Division determines whether the complainant is a "person in need of protection" under section 97 of the Immigration and Refugee Protection Act, which mandates the protection of persons who face a real risk of torture within the meaning of article 1 of the Convention in case of a removal from Canada. A person who falls within the definition of a "person in need of protection" has a statutory right under section 115 of the Act not to be removed. The State party submits that the complainant has not explained to the Committee why she did not seek protection from the Refugee Protection Division. The State party admits that the complainant was not eligible to apply to the Division for protection once the removal order had been issued against her on 1 June 2011; however, she had previously been eligible and failed to do so. Since the complainant did not apply to the Division for protection, the State party considers that the complainant's argumentation and behaviour are inconsistent with her alleged fear of torture or ill-treatment if returned to her country of origin.

4.3 Furthermore, the State party observes that the complainant did not apply for permanent residence on humanitarian and compassionate grounds. It submits that, if the complainant had applied for permanent residence from outside of Canada, she could have been allowed to remain in Canada as a permanent resident, depending on the assessment by Citizenship and Immigration Canada as to whether she would suffer unusual, undeserved or disproportionate hardship.[7] The State party recalls that, following legislative changes to the national refugee system in 2010, applications on humanitarian and compassionate grounds no longer have to be based on a risk to life or a risk of torture;[8] instead, they should substantiate whether a claimant would directly and personally experience unusual, undeserved or disproportionate hardship in the complainant's country of origin. The State party hence regrets the Committee's decisions in *Kalonzo v. Canada* (CAT/C/48/D/343/2008) and *T.I. v. Canada* (CAT/C/45/D/333/2007), in which the Committee considered that applications on humanitarian and compassionate grounds were not remedies that had to be exhausted for the purpose of admissibility. The State party

[6] The date of the funeral was not specified.

[7] Citizenship and Immigration Canada also considers that the best interests of the child may directly affect such a decision.

[8] See Immigration and Refugee Protection Act, sect. 25 (1.3): "In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97 (1) but must consider elements related to the hardships that affect the foreign national."

further submits that the complainant could have even sought leave from the Federal Court to apply for judicial review of any Refugee Protection Division or humanitarian and compassionate application decisions.

4.4 In addition, the State party submits that the complainant has not sufficiently substantiated her allegations that she fears a real and personal risk of harm in Uganda, and that her removal would be a violation of article 3 of the Convention. The State party recalls the Committee's jurisprudence in its general comment No. 1 (1997) on the implementation of article 3 in the context of article 22[9] that article 3 places the burden upon the complainant to establish that she would personally be at risk and that the grounds on which a claim is established must go beyond mere theory or suspicion. The State party argues that that approach has consistently been adopted by the Committee in numerous cases.[10] Recalling the evaluation test for the risk of torture as described in general comment No. 1,[11] the State party concludes that there are no substantial grounds for believing that the complainant would be in danger of being subjected to torture upon return to Uganda. The State party further submits that it is not the Committee's role to weigh evidence or reassess findings of fact made by domestic courts or tribunals.[12] It notes that the complainant's allegations have been considered by competent and impartial domestic procedures that did not find a personal risk for the complainant if returned to Uganda. Moreover, the complainant failed to provide evidence that she has been subjected to torture in the past and that she faces a foreseeable and personal risk of torture if returned to Uganda. The State party relies on the findings of the two pre-removal risk assessment officers who concluded that the complainant would not be subjected to a risk of persecution, torture, threat to life or cruel, inhuman or degrading treatment or punishment if returned to Uganda. The second pre-removal risk assessment decision noted that the complainant had not lived in Uganda for 12 years, and that there was insufficient evidence that the she would be targeted for any reason when returned. Finally, Citizenship and Immigration Canada took into consideration the country conditions and the personal circumstances of the complainant, and concluded that she was not a person in need of protection.

4.5 The State party notes that the complainant submitted new evidence to the Committee, including letters from the complainant's family and from individuals and organizations in Canada. However, that evidence was given no weight by the Committee since it was not first-hand information and did not establish that the complainant would face a real and personal risk of torture if she were returned to Uganda. The evidence, including a petition containing more than 2,000 signatures calling on Canada not to deport the complainant given the risks she could face as a lesbian in Uganda and a transcript of the House of Commons debate on 4 June 2014, was submitted without establishing any evidence of a personal risk of torture for the complainant if returned to Uganda. In that context, the State party observes that the complainant also failed to request an administrative deferral of removal from the Canada Border Services Agency, as individuals alleging new evidence of a personal risk may request a deferral of a removal order against them from a Canada Border Services Agency enforcement officer. The Federal Court of Appeal has held that an enforcement officer must defer removal if there is compelling evidence that the removal would expose the person to a risk of death, extreme sanction or inhuman treatment. The complainant could also have applied for leave to seek judicial review of a decision denying an administrative deferral of removal, and could have brought a motion for stay of removal pending the outcome of the judicial review application.

4.6 On the other hand, the State party acknowledges that the situation of lesbian, gay, bisexual, transgender and intersex persons in Uganda is problematic, especially due to the Anti-Homosexuality Act adopted in 2014. While certain consensual same-sex conduct was

[9] Replaced by the Committee's general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, as of 6 December 2017.

[10] See *X v. Netherlands* (CAT/C/16/D/36/1995), para. 7.2; *Dadar v. Canada* (CAT/C/35/D/258/2004), para. 8.3; *S.P.A. v. Canada* (CAT/C/37/D/282/2005), para. 7.1; *C.A.R.M. v. Canada* (CAT/C/38/D/298/2006), para. 8.7; and *T.I. v. Canada*, para. 7.3.

[11] See *Kalonzo v. Canada*, paras. 9.2–9.3.

[12] See *A.K. v. Australia* (CAT/C/32/D/148/1999), para. 6.4; and *G.A. van Meurs v. Netherlands* (CCPR/C/39/D/215/1986), para. 7.1.

criminalized and already punishable by a penalty of up to life imprisonment under section 145 of the Ugandan Penal Code of 1950, the new Act stipulates life imprisonment for a broader range of homosexual conduct, and creates additional crimes with up to seven years' imprisonment for those advocating or supporting gay rights.[13] Canada recalls that the United States Department of State's 2013 human rights report on Uganda indicated that there had been arrests under section 145 of the Penal Code for homosexual acts, but that no one had been convicted of homosexuality in Uganda.[14] The State party submits that criminalization of homosexuality is insufficient to substantiate the allegations of a personal risk of torture, and that the possibility of prosecution by the State does not amount to torture under article 1 of the Convention. The State party recalls the Committee's views that difficult country conditions are not by themselves sufficient grounds for determining that a particular person would be in danger of being subjected to torture if expelled to that country, and that additional grounds must be taken into account to show that the individual concerned would be personally at risk.[15]

4.7 Accordingly, the State party submits that the complainant has not substantiated her claim on prima facie basis, as none of the grounds on which she based her alleged risk of torture, including that she faces a real and personal risk of violence at the hands of her daughter's father, the Government of Uganda and society in general, have been established.

4.8 As regards the merits of the case, the State party considers that the communication is wholly without merit as there is no evidence in the communication to suggest that the complainant is at foreseeable, real and personal risk of torture if returned to Uganda.

Complainant's comments on the State party's observations

5.1 On 12 April 2018, the complainant transmitted her comments through a third party, Alex Varricchio, a friend of the complainant's from Canada.[16]

5.2 As regards the exhaustion of domestic remedies, the complainant rejects the State party's observation that her communication is inadmissible for non-exhaustion of domestic remedies. The complainant recalls that she was granted legal permissions to stay in Canada from December 1999 to June 2004 and from December 2004 to October 2006. She submits that she grew scared that she would be forcibly deported back to Uganda where she would be at risk of torture, imprisonment or death. She did not know what to do: she had no money, was very scared of being detected by the Canadian authorities and was not aware of the available remedies. She claims that she once verbally indicated to a Canadian immigration officer that she wanted to make a claim for refugee protection, but was told that she was not eligible. She also submits that, since the removal order against her was issued, on 1 June 2011, she has been ineligible to file a refugee claim in Canada. She thus claims that she had no choice but to hide.

5.3 The complainant submits that she did not apply for permanent residence on the basis of humanitarian and compassionate grounds because she thought that it would certainly be rejected under Canadian law, and that in any case a pending humanitarian and compassionate application does not constitute a ground for deferring a removal that has become enforceable.[17] The complainant also submits that in most recent cases the Federal Court had held that there was no duty on the enforcement officer to defer removal pending determination of the application. She recalls the Committee's jurisprudence in recent cases,

[13] The death penalty, which was contained in a previous version of the Act, was removed from the final version.

[14] See also Human Rights Watch, "Uganda: Anti-Homosexuality Act's Heavy Toll: Discriminatory Law Prompts Arrests, Attacks, Evictions and Flight", 14 May 2014.

[15] See *E.L. v. Canada* (CAT/C/48/D/370/2009), para. 8.5; and *C.A.R.M. v. Canada*, para. 8.6.

[16] The long delay between the State party's observations in August 2015 and the complainant's comments in 12 April 2018 is due to special circumstances. Although the complainant initially submitted her comments on admissibility and the merits and on the State party's request to lift interim measures on 27 December 2015, the Committee never received the submission. See also para. 1.3 above.

[17] See *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, 2001 FCT 148.

such as *Kalonzo v. Canada*,[18] wherein the Committee considered that humanitarian and compassionate applications were not remedies that had to be exhausted for the purpose of admissibility.

5.4 The complainant further rejects the State party's argument that she could also have applied to the Canada Border Services Agency for an administrative deferral of removal or sought judicial review of the negative decision by the Federal Court. She recalls that a request to defer removal is made to the removal officer with the Canada Border Services Agency responsible for deporting the person concerned to his or her country of origin. She submits that the discretion of such removal officers is practically non-existent, as they are required to remove individuals very quickly, and also that there is no consistency on the part of the Federal Court when deciding on whether to grant a stay of removal pending judicial review of a negative decision on an application for administrative deferral.

5.5 Finally, the complainant submits that an application to the Federal Court for leave to appeal and judicial review against an immigration decision made by the executive branch of Government would fall within the ambit of Canadian administrative law. Where the Federal Court is asked to grant an application for review of the particular facts and circumstances that formed the basis of the decision of a Canadian government official, Canadian law allows only for the use of the reasonableness standard of review in examining the application for leave to appeal. The complainant claims that the reasonableness standard of review is not a sufficient remedy, as it denies her the opportunity to have a judicial review of the merits of her situation prior to being expelled from Canada. The complainant thus reiterates that she has exhausted all available domestic remedies and requests the Committee to consider her communication admissible.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.[19]

6.3 The Committee takes note of the fact that the complainant twice initiated the pre-removal risk assessment procedure and challenged the negative decisions on both assessments through applications to the Federal Court for judicial review. The Committee also notes the State party's argument that the complaint should be declared inadmissible under article 22 (5) (b) of the Convention on the grounds that the complainant failed to exhaust all available domestic remedies, as she failed to apply to the Refugee Protection Division for refugee status or protection, failed to make an application for permanent residence on the basis of humanitarian and compassionate grounds and failed to request an administrative deferral of her removal from the Canada Border Services Agency. The Committee further observes the State party's assertion that the complainant could have sought leave from the Federal Court to apply for judicial review of Refugee Protection Division or humanitarian and compassionate application decisions.

6.4 The Committee recalls its jurisprudence that a humanitarian and compassionate application is not an effective remedy for the purposes of admissibility pursuant to article 22 (5) (b) of the Convention, given its discretionary and non-judicial nature and the fact

[18] See *Kalonzo v. Canada*, para. 8.3.

[19] See *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2. See also the Committee's general comment No. 4.

that it does not stay the removal of a complainant.[20] Accordingly, the Committee does not consider it necessary for the complainant to exhaust the application for permanent residence on the basis of humanitarian and compassionate grounds for the purpose of admissibility.[21]

6.5 As for the complainant's failure to apply for refugee status or protection, the Committee notes the State party's argument that the Refugee Protection Division considers applications by foreign nationals seeking protection from Canada based on fear of persecution, torture or other serious violations of their human rights in case of their removal to the country of origin and determines whether the complainant is a person in need of protection. The Committee also notes the State party's observation that the complainant was eligible to apply to the Division for protection but failed to do so, and that she stopped being eligible to apply for such protection once a removal order had been issued against her. The Committee further notes the complainant's submission that she considered pursuing that remedy, but did not know what to do since she was scared of being detected by the Canadian authorities, and was not aware in general of the available remedies. In this context, the Committee notes the complainant's argument that she once verbally indicated to a Canadian immigration officer that she wanted to make a claim for refugee protection, but was told that she was not eligible to make such a claim.

6.6 As regards the complainant's failure to request an administrative deferral of her removal, the Committee notes the State party's argument that individuals who allege new evidence of a personal risk may request a deferral of removal from a Canada Border Services Agency enforcement officer. The Committee also notes that the complainant submitted new evidence during the pre-removal risk assessment and judicial review procedures, but did not apply for an administrative deferral of her removal. It further notes the complainant's comment that she was not aware of any of those procedures. In that regard, the Committee considers that, except the alleged absence of knowledge about all the available procedures to exhaust domestic remedies, the complainant has not provided any information on her efforts to eventually obtain legal aid for the purpose of initiating such proceedings,[22] nor has she demonstrated that the refugee status application and request for an administrative deferral of removal were unavailable or ineffective remedies.[23]

6.7 In addition, the Committee takes note of the State's party argument that the complainant could have also applied for a judicial review of the decision denying the granting of refugee status or protection by the Refugee Protection Division, or for an administrative deferral of the removal ordered by the Canada Border Services Agency, and could have even brought a motion for stay of removal pending the outcome of the judicial review application. The Committee recalls its jurisprudence that judicial review in the State party is not a mere formality and that the Federal Court may in appropriate cases look at the substance of a case.[24] While noting the complainant's argument that judicial review before the Federal Court is not an effective remedy as it does not stop or delay the deportation in the majority of cases, the Committee considers that the complainant has failed to advance sufficient elements that would show that a judicial review of the decision denying refugee status or protection, or an administrative deferral of removal, would have been ineffective in this case and has not justified her failure to avail herself of those remedies.

6.8 The Committee concludes that: (a) the complainant could have applied for refugee status in Canada, but it was no longer available when she wanted to make a claim, and she was not eligible for Refugee Protection Division protection since a removal order had been issued against her; (b) the complainant failed to apply for an administrative deferral of her removal; and (c) the complainant did not seek leave for judicial review of the negative decisions, and did not request a motion to stay her removal pending such judicial review.

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[20] See *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.3; *J.M. v. Canada* (CAT/C/60/D/699/2015), para. 6.2; *A. v. Canada* (CAT/C/57/D/583/2014), para. 6.2; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

[21] See *S.S. v. Canada* (CAT/C/62/D/715/2015), para. 6.3.

[22] See *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.

[23] See *E.Y. v. Canada*, para. 9.3. See also the Committee's general comment No. 4 (2017), para. 34.

[24] See *Aung v. Canada* (CAT/C/36/D/273/2005), para. 6.3.

6.9 Accordingly, the Committee is satisfied with the argument of the State party that, in this particular case, there were remedies, both available and effective, which the complainant has not exhausted.[25] In the light of this finding, the Committee does not deem it necessary to examine the State party's assertion that the communication is also inadmissible as incompatible with the Convention, or manifestly unfounded. However, taking into account the background reports on the situation of gays and lesbians in Uganda (see para. 4.6 above), the Committee considers that the complainant as a lesbian would face a risk of arrest if she were returned to Uganda. In the circumstances of the present case, the Committee invites the State party to ensure that the complainant can have access to remedies available on appeal, including the necessary legal aid, to challenge the negative decisions that allowed for her to be forcibly removed, including an application for permanent residence on humanitarian and compassionate grounds, given that the complainant is a single mother with a minor daughter who is a Canadian citizen, who is not subject to removal from Canada.[26]

6.10 Therefore the Committee decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.

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[25] See *J.S. v. Canada*, para. 6.6; *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.6; *Shodeinde v. Canada* (CAT/C/63/D/621/2014), para. 6.8; and *U.A. v. Canada* (CAT/C/63/D/767/2016), para. 6.7.

[26] See *Shodeinde v. Canada*, para. 7 (c).